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Remarks:

*Regarding the objections to the drawings under 37 CFR 1.83(a):*

The applicant respectfully traverses the Examiner's objections as to "drawings". A review of the prior *Amendment* dated 01.Nov.2007 reveals that the applicant included at page 11 thereof a discussion of a document, which however does not form part of the disclosure of the instant application, but rather was provided to demonstrate the relevant level of 'skill in the art' at the time of the filing of the instant application. This was clearly stated in the prior *Amendment* when the applicant noted that: "The applicant notes that to a skilled artisan, that microorganisms are usually classified with regard to their durability and resistance to eradication and several well recognized scales exist." and later introduced the paper titled "Should the Test Methods for Efficacy of Disinfectants use Vertebrate Viruses Dried on Carriers to Advance Virucidal Claims Substantiation in Public Health Arena", by Dr. M. Khalid Ijaz and Joseph Rubino in support of this premise. Thus it is believed that the Examiner's objection is improper as a rejection of 37 CFR 1.83(a) is inapplicable, and the objection should be properly withdrawn.

*Regarding the rejection of claims 1-8, and 13-24 under 35 USC 102(e) in view of US 6080387 to Zhou, et al. (hereinafter "Zhou"):*

The applicant traverses the rejection of the claims in view of the reference to Zhou, particularly in view of the foregoing amendments to the claims. .

With regard to Zhou, the applicant point out that a reading of Zhou's quickly reveals to the reader that the invention of Zhou is based on a composition which includes the following constituents (see Zhou, col. 3):

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The aerosol formulation comprises an antimicrobial composition that is mixed with a propellant. The composition has the following ingredients: 15

- (a) an anionic polymer or prepolymer;
- (b) a quaternary ammonium compound, the components (a) and (b) combining to form an antimicrobially effective complex; 20
- (c) at least one water-soluble or dispersible organic solvent having a vapor pressure of at least 0.001 mm Hg at 25° C., said at least one organic solvent present in a solubilizing—or dispersion—effective amount;
- (d) an effective amount of a propellant; and 25
- (e) the remainder, water.

Additional adjuncts in small amounts such as buffers, fragrances, dyes and the like can be included to provide desirable attributes of such adjuncts.

Therein is clearly indicated that amongst essential constituents are (a) and (b) which “.. the components combining to form an antimicrobially effective complex..” This is further supported by Zhou in his statement at column 4 wherein he indicates that:

The antimicrobial composition is preferably prepared by mixing effective amounts of the anionic component and the quaternary ammonium compound in water with agitation. A water miscible solvent and/or dispersing/emulsifying/wetting agent is preferably added before the two main 5

As well as at column 5 where he indicates that:

part of the invention. The most preferred range of 5:1 to 1:5 appears to result in an aesthetically pleasing film which has excellent residual antimicrobial efficacy, as well as disinfectancy. This also seems to imply that, in the cured film/residue, there may actually not be complete ion pairing between the quaternary ammonium compound and the anionic sites in the anionic polymer, since the quaternary ammonium active sites are available for residual microbial kill, although there is clearly an interaction between the two components. Again, the mechanism of the film/residue is not 15 20

And later at column 5 Zhou unequivocally “critically” identifies the role of the quaternary ammonium compound, or surfactant as being the sole agent responsible for providing a bacteriostatic/disinfectant benefit wherein he recites:

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A critical second component of the invention is a quaternary ammonium compound, or surfactant. These types of 40 surfactants are typically used in bathroom cleaners because they are generally considered "broad spectrum" antimicrobial compounds, having efficacy against both gram positive (e.g., *Staphylococcus* sp.) and gram negative (e.g., *Escherichia coli* or *Klebsiella* sp.) microorganisms. Thus, the quaternary ammonium surfactant, or compounds, are incorporated for bacteriostatic/disinfectant purposes and should be 45 present in amounts effective for such purposes.

From the foregoing, it is made unequivocally clear that Zhou's compositions require this "(a)+(b) complex" in order to provide an antimicrobial benefit, and particularly in view of the foregoing passages of Zhou, that the quaternary ammonium compound provides the antimicrobial benefit. Thus it is clear to see that the both (a) and (b), (..but especially the quaternary ammonium compound..) are (i) essential constituents, and (ii) the quaternary ammonium compound provides the antimicrobial benefit. Thus the (a)+(b) complex define the operative mechanism for providing an antimicrobial benefit according to Zhou.

In contrast to the above, by even a simple review of the present applicant's specification, applicant's claimed compositions do not require either (a) or (b), nor the "(a)+(b) complex" in order to provide an antimicrobial benefit. Thus, *prima facie*, applicant's invention which provides effective antimicrobial efficacy absent the "(a)+(b) complex" is a clear indication that a different operative mechanism is at work, and thus is *prima facie* both unanticipated and nonobvious over the Zhou reference. (For example, applicant's Ex. 30 demonstrates a 6 log<sub>10</sub> reduction of Poliovirus absent both of Zhou's (a) and or (b), and none of applicant's examples illustrate Zhou's (b) polymers). The Examiner's assertions to the contrary are unsupported by the Zhou reference for the reasons outlined above. At best, the Examiner's selective reading of Zhou appears to be a "hindsight reconstruction" of the applicant's claimed invention which is however impermissible. The Examiner is reminded that in *In re Fritch*, 972 F.2d 1260, 1266, 23 USPQ2d 1780, 1784 (Fed. Cir. 1992), the Federal Circuit stated:

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"It is impermissible to use the claimed invention as an instruction manual or "template" to piece together the teachings of the prior art so that the claimed invention is rendered obvious. *In re Gorman*, 933 F.2d 982, 987, 18 USPQ2d 1885; 1888 (Fed. Cir. 1991). This court has previously stated that "[o]ne cannot use hindsight reconstruction to pick and choose among isolated disclosures in the prior art to deprecate the claimed invention." (quoting *In re Fine*, 837 F.2d at 1075, 5 USPQ2d at 1600)

See also W.L. Gore & Associates, Inc. v. Garlock, Inc. 220 USPQ 303 (CAFC, 1983); In re Mercier 185 USPQ 774, 778 (CCPA, 1975); In re Geiger 2 USPQ2d 1276 (CAFC, 1987)

Thus, the applicant is of the opinion that the Examiner's rejection is improper and should be withdrawn.

Accordingly, in view of the foregoing remarks, reconsideration of the propriety of the rejection under 35 USC 102(e) is requested, and it is further requested that the rejection be withdrawn.

Should the Examiner in charge of this application believe that telephonic communication with the undersigned would meaningfully advance the prosecution of this application, they are invited to call the undersigned at their earliest convenience.

#### CONDITIONAL AUTHORIZATION FOR FEES

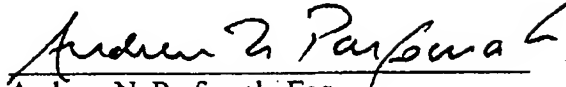
Should any further fee be required by the Commissioner in order to permit the timely entry of this paper, the Commissioner is authorized to charge any such fee to Deposit Account No. 14-1263.

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Respectfully Submitted;

  
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20 May 2008  
Date:

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CERTIFICATION OF TELEFAX TRANSMISSION:

I hereby certify that this paper and all attachments thereto is being telefax transmitted to the US Patent and Trademark Office to telefax number: 571 273-8300 on the date shown below:

  
Andrew N. Parfomak

20 May 2008  
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